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IN THE

Supreme Court of the United States

October Term, 1959.

No. 903

WALTER SEIDMAN,

Petitioner,

v.

ANNE HAMILTON.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1959.

No.

WALTER SEIDMAN,

Petitioner,

v.

ANNE HAMILTON.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Walter Seidman, Petitioner, by his attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on February 17, 1960.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania, printed in the Appendix, *infra* (pp. 1a-6a) is reported at 173 F. Supp. 642 (D. C., E. D. Pa., 1960). The opinion and judgment of the United States Court of Appeals for the Third Circuit, affirming the District Court's judgment are printed in the Appendix, *infra* (pp. 7a-12a) and the opinion has not been reported at this time.

JURIDICTION.

The opinion of the United States Court of Appeals for the Third Circuit held that in a diversity action where the factual question of citizenship of the defendant is in dispute and is not clear as a matter of law, that the plaintiff is not entitled to have this issue tried to a jury. The certiorari jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

Where plaintiff, a Pennsylvania citizen, brings suit for personal injuries in the United States District Court on the basis of diversity, and evidence is presented by deposition and at a hearing before the Court on defendant's motion to dismiss for want of jurisdiction which is not so clear as to establish as a matter of law that defendant is a citizen of Pennsylvania or a citizen of Delaware, did not the Court's refusal to submit this factual question to a jury deny plaintiff his right to a jury trial in violation of the Seventh Amendment of the Constitution of the United States?

STATUTE INVOLVED.

The statute asserted to be invalid as applied is Rule 38 of the Federal Rules of Civil Procedure, 28 U. S. C., which provides as follows:

"RULE 38. JURY TRIAL OF RIGHT.

"(a) *Right Preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) *Same: Specification of Issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

The constitutional provision asserted to be violated is the Seventh Amendment of the Constitution of the United States, which provides as follows:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

This is a petition for a writ of certiorari from a decision of the United States Court of Appeals for the Third Circuit, affirming a decision of the United States District Court for the Eastern District of Pennsylvania, holding that on a disputed question of domicile of the defendant where evidence is susceptible of two conclusions, in an action where federal jurisdiction is based on diversity of citizenship, the judge and not the jury should determine the domicile.

An automobile collision between plaintiff and defendant occurred on October 28, 1955 in Pennsylvania. At the time of the collision, plaintiff and the investigating officers ascertained from defendant's driver's license that her address was Box 265, 120 Wells Avenue, Newark, Delaware. No other address was then available (21a, 22a, 37a).

Suit was commenced in the United States District Court for the Eastern District of Pennsylvania on April 24, 1956. After the issuance of several alias summonses, service by registered mail was effected at the Delaware address (1a). An answer was filed by defendant denying the existence of diversity jurisdiction and averring that she was a resident of Pennsylvania. Inquiry into the fact of defendant's citizenship was made by a deposition of defendant. Defendant then filed a Motion to Dismiss for want of jurisdiction. This motion was argued before the District Court. The Court ordered a further hearing to resolve questions not clear on the existing record (10a). A hearing was held on May 6, 1959. The evidence adduced indicated the following: Defendant was born in Philadelphia, Pennsylvania and at an early age moved with her parents to Newark, Delaware. In 1941, she attended the University of Pennsylvania in Philadelphia but remained a Delaware citizen. After completing school in 1943, she worked in Pennsylvania but continued to regard herself as a Delaware resident (19a). In October 1951, she married a Pennsyl

vania resident and in June 1952, established a home with him at 620 Bader Road, Jenkintown, Pennsylvania. Defendant's husband died on November 1, 1954. As a part of winding up the estate, defendant purchased the Jenkintown home.

Defendant was registered to vote in Pennsylvania. She voted there last in 1955 (31a). Defendant throughout this period had only a Delaware driver's license (22a). This was a permanent license which she obtained sometime after 1945. She never obtained a Pennsylvania driver's license. Defendant gave no notice to the Delaware authorities of any change of address from the time of the issuance of the license (43a). In March 1956, defendant went abroad staying out of the country until August 1956. In September 1956, defendant again left the country for an extensive period of travel, staying abroad until January 30, 1957. During 1957, she lived at her parents' home in Newark, Delaware. She visited for short periods in New York and Washington. She spent practically no time in Pennsylvania.

In March 1958, defendant sold the Jenkintown home. Her testimony was that from the time of her husband's death until the sale of the house, real estate agents harrassed her and sought to place the house for sale (25a). She testified that at no time did she seriously intend to sell the property until March 15, 1958 (48a) when one Connor, a real estate agent, produced a buyer with a ten per cent down payment for the property (42a, 48a, 49a). Within three weeks she sold the property through him. However, defendant admitted on cross-examination that when she went abroad she had delivered the key to the house to this same Connor, though she admitted that he was a total stranger, and that she told him he could sell the house for $50,000.00. This she tried to explain away as a facetious comment. The jury could have concluded otherwise. Connor did take charge of the house in her absence and did produce a purchaser. She paid him a 5% broker's commis-

sion (33a). Obviously this was no joke to him. This evidence if believed by a jury tended to show an end to domiciliary ties with Pennsylvania when she delivered the key to the house.

Consonantly therewith, plaintiff showed that on April 3, 1958, she vacated the Jenkintown address and removed to 356 South College Avenue, Newark, Delaware, where she settled. Thereafter she visited in Washington, D. C., staying at the Cavalier Arms Apartments for two months, the Alban Park Towers for six weeks, and the Sheraton Park Hotel for three weeks. She eventually bought a house physically located in Maryland, but with a Newark, Delaware address (4th Atkinson Circle, Glen Fox, Newark, Delaware) (11a). This cumulative evidence could easily have per se led the jury to conclude she had a domiciliary base outside Pennsylvania if such conclusion were not indeed inescapable.

All through her marriage and down to the present time, defendant had maintained an account in a Newark bank which lay dormant during her marriage, but which she actively resumed using after her husband's death (20a). She received her mail at 120 Wells Avenue, Newark, Delaware, after her husband died (43a).

The lower Court, without submitting the question to a jury, found *as a matter of law*, that the defendant was a citizen of Pennsylvania on April 24, 1956 when suit was commenced. On considering the conflicting evidence, the Court held as a matter of law that the defendant by delivering the key to a real estate agent did not intend to put the house up for sale and so had no intention of abandoning her Pennsylvania domicile. It ignored the fact that at least an *equally* tenable contrary conclusion could have been reached by the jury. The Court usurped the jury function and entered an order dated June 2, 1959, dismissing plaintiff's suit for want of jurisdiction. The Court of Appeals ruled that the lower Court had the power to make findings of fact, though the evidence was in conflict and susceptible to con-

trary conclusions as to domicile, despite plaintiff's demand that a jury rule on this question of fact. Treating the Court's finding the same as it would such judge's findings of fact in a case where there has been a voluntary waiver of a jury trial, the Court of Appeals held the lower Court's decision on the question of intent was not clearly erroneous and affirmed.

REASON FOR GRANTING THE WRIT.

This petition presents sharply and for the *first* time the absolute right of the plaintiff in a diversity case to have the disputed factual questions relating to citizenship of the parties decided by a jury. Petitioner maintains that the guarantees of the Seventh Amendment prohibit the usurpation of that right by a Court to determine this factual question just as it does any other.

ARGUMENT.

Both the trial Court and the Court of Appeals clearly recognized that the evidence was not so clear and unambiguous as to justify taking the question from the jury. The trial Court in analyzing the evidence referred to "equivocal indicia" of intent in determining domicile and "more weighty data" supporting the defendant's contentions. *These comments concede the conflicting nature of the evidence.* The Court of Appeals in reviewing the evidence reached the following conclusion (Page 5):

> ". . . On the basis of the undisputed testimony and the reasonable inferences that could be drawn therefrom, the district court concluded that the appellee was a citizen of Pennsylvania when the action was initiated and so dismissed the case. The most that can be said about the appellant's analysis of the evidence is that *a court, if it disbelieved the appellee might have come to a contrary result on the issue of intention and thus have found the appellee to have been a citizen of Delaware.*[1] That this conclusion was not compelled,

1. Speaking in almost identical words in entering a judgment n.o.v., the District Court in *Myers v. Reading Co.*, 63 F. Supp. 817 (D. C. E. D. Pa., 1945) said at page 821:

> "From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

This Court in reversing the District Court and the Court of Appeals, which affirmed below, 155 F. 2d 523 (C. A. 3, 1946), held that it was specifically in such situations that only a jury can determine the factual question and said 331 U. S. 477, 67 S. Ct. 1334 (1947) at page 484:

> "The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence . . . In the

however, is quite obvious from a review of the facts recited above. *The trial court had an opportunity to hear the appellee testify and credited her testimony.* It is not the province of an appellate court to reverse a trial court under such circumstances unless it is convinced that clear error has been committed. This is not such a case." (Emphasis supplied)

But the test here applied is recognized only where the parties have waived a jury trial. Here, the plaintiff did not. Both courts conceding the evidence was conflicting, recognized that this was not a proper case for a directed verdict. Cf. *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077 (1943) and *Berry v. United States*, 312 U. S. 450, 61 S. Ct. 637 (1941). The decisions below were clearly predicated upon the erroneous belief that it is the function of the Court not the jury to determine factual questions of jurisdiction. The authority relied on is Moore, Federal Jurisdiction § 38.36 2nd Ed. Prof. Moore is generally critical of the jury system and disparages the role of the jury in contemporary cases. Moore asserts that it is the law in federal cases where both legal and equitable claims are made in a single action, that there is no right to a jury trial. § 38.24(2). This Court has recently held precisely the contrary in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 79 S. Ct. 948 (1959). Mr. Justice Black speaking for the Court pointed out at page 510:

"'. . . Since the right to a jury trial is a constitutional one, however, while no similar requirement pro-

face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict." and at page 485:

"Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

tects trials by the Court, that discretion is very narrowly limited and must, whenever possible, be exercised to preserve jury trial. . . ."

This Court held that the trial Court did not have discretion to determine that the plaintiff's claims were essentially equitable and deny him a jury trial.

Moore also asserts that there is no statutory basis for a jury trial in Federal Courts as to questions of jurisdiction of the person, venue and forum non conveniens. It is submitted that Moore's statement of this principal of law is equally erroneous. The petitioner, moreover, relies upon the constitutional guarantee of trial by jury as well as the statutory provisions. Rule 38 does preserve the right to a trial by jury "inviolate". It further provides in subsection (c) that unless a party specifies the issues he wishes tried to a jury "he shall be deemed to have demanded trial by jury for all the issues so triable." Although historically trial by jury developed in England where no jurisdictional questions comparable to diversity, venue, and statutory amount existed, the Courts of the United States have been zealous and careful to preserve the right to trial by jury when any question impinged upon the litigants' fundamental right to have disputed questions of fact determined by a jury.

The jury cannot be supplanted when there is any evidence on which its verdict might be sustained. *Anderson v. Atlantic Coast Line R. Co.*, 350 U. S. 807, 76 S. Ct. 60 (1955) and *Swafford v. Atlantic Coast Line R. Co.*, 350 U. S. 807, 76 S. Ct. 80 (1955). A fortiori, when there is any disputed question of fact, this issue must be submitted to the jury. The Court may not take the case from the jury. *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854. (1942).

In two recent cases involving diversity jurisdiction this Court has held that the petitioner is entitled to have the legal-fact questions decided by the jury and not the

judge. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525, 78 S. Ct. 893 (1958) and *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273, 79 S. Ct. 1184 (1959). See also *Curry v. Pyramid Life Insurance Company*, 271 F. 2d 1 (C. A. 8, 1959). Both the *Byrd* and *Magenau* cases involved the status under state law of claimants in negligence cases. In both cases, the jury had found for the plaintiff. On appeal, the Courts of Appeals set aside the verdicts on the ground that the status of the injured party, under state law was that of an employee and, therefore, that his remedy was exclusively under state law. In both cases, the factual question of status was disputed. This Court reversed the Courts of Appeals holding that those questions must be decided by the jury under federal law.

In *Byrd v. Blue Ridge Rural Electric Cooperative, supra*, Mr. Justice Harlan, Mr. Justice Frankfurter and Mr. Justice Whittaker dissented only because they were of the opinion that the plaintiff had waived his right to a jury trial and had no evidence to present bearing on the question of his status. In the case at bar, petitioner has from the outset insisted that the issue of defendant's citizenship must be submitted to a jury and he has already presented evidence sufficient to take the case to the jury which easily could and probably would have decided it contrary to the finding of the trial Court.

Mr. Justice Frankfurter and Mr. Justice Harlan joined by Mr. Justice Stewart dissented in *Magenau v. Aetna Freight Lines, Inc., supra*, on the ground that certiorari was improvidently granted. That case had been submitted to the jury. The trial court, however, drew legal conclusions from the facts as found by the jury. Further, there was a question of interpretation of local law. Not even such circumstances are present in the case at bar. The instant case has never been submitted to a jury. The issue was properly and timely raised. No question of local law is involved.

Careful research has failed to disclose any reported case in which, when a factual question as to the citizenship

of the parties was presented, it was held that the issue of diversity on which jurisdiction is predicated should not be decided by a jury. *Gilbert v. David*, 235 U. S. 561, 35 S. Ct. 164 (1915) is cited as sustaining the right of the judge to make such a determination. In that case, however, the Court found the facts were so clear that there was no doubt that the lower court had correctly determined the question of domicile. In other words, had the case been submitted to a jury, a directed verdict would have been proper. Both lower courts here concede that is not the state of the record here.

Where the factual question of diversity was not clear the courts have held that a jury trial is a matter of right. *Kever v. Philadelphia & Reading Coal & Iron Co.*, 234 F. 814 (D. C. E. D. N. Y., 1916); *O'Donnell v. Beechnut Packing Co.*, 45 App. D. C. 425 (1916); *Fischer v. Munsey Trust Co.*, 44 App. D. C. 212 (1915). See *Byrne v. Pennsylvania Railroad Company*, 262 F. 2d 906 (C. A. 3, 1958), in which the court divided the trial into two parts and submitted the question of jurisdiction to the jury on interrogatories. See also *Schell v. Ford Motor Company*, 270 F. 2d 384 (C. A. 1, 1959), in which a directed verdict was reversed and the cause remanded for a jury trial on the issue of fraud.

Where the question of diversity has been decided by the court without a jury, the facts have been so clear that there was no factual question or contrary permissible inference which could have properly been submitted to a jury. *Romero v. International Terminal Operating Co.*, 142 F. Supp. 570 (D. C. S. D. N. Y., 1956); *Williams v. Capital Transit Co.*, 215 F. 2d 487 (C. A. D. C., 1954); *Brown v. Fennell*, 155 F. Supp. 424 (D. C. E. D. Pa., 1957); *Underwood v. Maloney*, 256 F. 2d 334 (C. A. 3, 1958); and *Schiemann v. Grace Line, Inc.*, 269 F. 2d 596 (C. A. 2, 1959). Note that the Court in that case declared at page 597:

> "Were there any disputed questions of fact the jury is obviously the unit in our judicial system to resolve them, . . ."

Walker v. United States Gypsum Company, 270 F. 2d 857 (C. A. 4, 1959); *McCann v. Newport News Shipbuilding & Dry Dock Co.*, 177 F. Supp. 909 (D. C. E. D. Va., 1959). See also *Guarantee Trust Co. v. Collings*, 76 F. 2d 870 (C. A. 3, 1935) citing *Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293 (1898). *Wetmore v. Rymer, supra*, involved a diversity action in which the court of its own motion dismissed the complaint on the ground that the amount of the claim was insufficient for federal jurisdiction. The facts were perfectly clear. The court in discussing comparable jurisdictional problems referred to a possible factual question involving diversity at page 295:

> "In such cases whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing the jury, would thus be subjected to the review by this court which was intended by congress."

The right to jury trial in jurisdictional questions was not considered in *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 56 S. Ct. 780 (1936). There the plaintiff did not present evidence as to the requisite jurisdictional amount and the court held that he had failed to meet his burden of proof. While the jurisdictional question was raised in the following cases, the right to a jury trial as to that issue was not presented. *Canadian Pac. R. Co. v. Wenham*, 146 F. 206 (C. A. 2, 1906); *Lehigh Valley Coal Co. v. Washko*, 231 F. 42 (C. A. 2, 1916). See also *Canister Co. v. Leahy*, 182 F. 2d 510 (C. A. 3, 1950). Cf. *Dawson v. Columbia Ave. S. F. S. T. & T. Co.*, 197 U. S. 178, 25 S. Ct. 420 (1905) where the parties had not even asked for a jury trial.

The question of sufficiency of service under state law does not affect the status of the action. *Wall v. Chesapeake & O. R. Co.*, 95 F. 398 (C. A. 7, 1899). Therefore, a

decision by the court rather than the jury on this question cannot deprive a litigant of access to the federal courts. Note that this case was decided long before the rulings of the Supreme Court that procedural matters should be determined by federal law.

Under federal law, it has been held as a self-evident proposition that all factual questions must be submitted to the jury. *Steffen v. Farmers Elevator Service Co.*, 109 F. Supp. 16 (D. C. N. D. Iowa, 1952). There has never been a suggestion in cases arising under federal law that there should be any distinction in the role of the jury in determining jurisdictional facts and other facts. It was only when as a matter of state law certain issues were exclusively for the court that in diversity cases the right to a jury in federal court was challenged. See *Byrd v. Blue Ridge Rural Electric Cooperative, supra.*

The primacy in which the jury system is held under federal law has been reaffirmed countless times. This Court has declared in *Dimick v. Schiedt*, 293 U. S. 474, 486, 55 S. Ct. 296 (1935):

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care".

When there is any factual question the issue must on demand be submitted to the jury. *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854 (1942). Where a factual question has been taken from the jury, the decision must be reversed. *Anderson v. Atlantic Coast Line R. Co.*, 350 U. S. 807, 76 S. Ct. 60 (1955) and *Swafford v. Atlantic Coast Line R. Co.*, 350 U. S. 807, 76 S. Ct. 80 (1955), *Gibson v. Phillips Petroleum Company*, 352 U. S. 874, 77 S. Ct. 16 (1956).

No question is more crucial or more important than that of jurisdiction. In the determination of jurisdictional questions greater safeguards and more scrupulous atten-

tion to procedural rights is observed than in the determination of any other fact. A litigant is entitled to a trial as to jurisdictional facts even in a wholly statutory proceeding where no judicial trial is provided in the statute. *Estep v. United States*, 327 U. S. 114, 66 S. Ct. 423 (1946). An essential jurisdictional fact must be determined by proper judicial trial even though other facts may be decided by an administrative officer. *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492 (1922). On appeal from an administrative order, the jurisdictional fact must be determined de novo by a court. *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932). Where the jurisdictional fact is diversity of citizenship, this Court has not been bound by technicalities but has looked at the primary and controlling issues in dispute. *City of Indianapolis v. Chase Nat. Bank*, 314 U. S. 63, 62 S. Ct. 15 (1941). Nor has this Court permitted the essential jurisdictional question of diversity to be determined by local law. *Smith v. Sperling*, 354 U. S. 91, 77 S. Ct. 1112 (1957).

In the case at bar, two fundamental concepts are drawn into question by the decisions of the courts below. First, is the preservation inviolate of the right to trial by jury where factual questions are admittedly not clear as a "matter of law". Cf. *Herron v. Southern Pac. Co.*, 283 U. S. 91, 51 S. Ct. 383 (1931). It is significant that the right to jury trial in a diversity suit is to be determined by federal law. *Ettelson v. Metropolitan Life Ins. Co.*, 137 F. 2d 62 (C. A. 3, 1943), cert. den. 320 U. S. 777, 64 S. Ct. 92 (1943). Second, is the necessity of a full trial as to jurisdictional facts. Where the jurisdictional fact question arises on a diversity action and there is a constitutional claim of right of jury trial, it follows ineluctibly that this factual question must be determined by a jury. As the Eighth Circuit has wisely observed in *Leimer v. Woods*, 196 F. 2d 828, 833 (C. A. 8, 1952):

> "In the long range, if the right of trial by jury is actually to be preserved thus inviolate to the parties, its

proclamation in legal letter can only be kept from becoming an artificiality by the accompaniment of a sympathetic judicial attitude. . . . ."

It has been suggested that both trial convenience and a due regard for the constitutional status of trial by jury require that in doubtful cases discretion be exercised in favor of a jury. Note, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 186, 191 (1959). Dean Leon Green, discussing the role of the Supreme Court in protecting right to jury trial in diversity cases points out that the burden on the federal courts need not be heavy and extended. "Two or three forthright decisions outlining the permissible limitations on jury trial as preserved by the Seventh Amendment should give the lower courts sufficient basis for avoiding at least the more harmful local rules". Green, Protection of Jury Trial—Diversity Cases, 35 Tex. L. Rev. 768, 771 (1957).

The case at bar presents the naked question of the right to a jury trial on the disputed factual question of diversity of citizenship. There are no doubtful or mitigating circumstances. The Court of Appeals has found that the facts as to diversity are not clear as a matter of law. No state substantive or procedural law would take this case or any issues involved from the jury. There is no question of masked pleadings. There is no claim of equitable rather than legal jurisdiction.

No delay or inconvenience will result from a requirement that the jurisdictional fact of diversity be submitted to a jury under these circumstances. A trial court can submit the jurisdictional question to the jury by special interrogatories or request special findings before proceeding with the trial. See *Byrne v. Pennsylvania Railroad Company, supra.* The discretion of the trial judge to direct a verdict in a proper case will not be circumscribed. Such a requirement would be consonant with the Constitution, Rule 38 of the Federal Rules of Civil Procedure, and the policy of the law to protect the right of trial by jury in the federal courts.

CONCLUSION.

The question presented by this petition and the decisions of the court below is substantial and important and does not represent an isolated decision of an inferior court, which, though, in error, does not present that type of recurring situation which this Court will review. Cf. *Gibson v. Phillips Petroleum Company, supra.* On the contrary, the judge-jury relationship in the federal courts is a recurring problem. The decisions of the courts below profoundly alter the judge-jury relationship in all diversity actions. The right of jury trial has been carefully preserved against violation arising from the adoption in diversity cases of state law limiting trial by jury. If the decision below is permitted to stand, in all diversity cases a federal judge may by withdrawing jurisdictional questions from the jury effectively deprive the litigant of his constitutional right to a trial by jury and his constitutional right to litigate in the federal courts. In three recent decisions this Court has clarified the right of a litigant to a jury trial in diversity cases. *Beacon Theatres, Inc. v. Westover,* 359 U. S. 500, 79 S. Ct. 948 (1959); *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U. S. 525, 78 S. Ct. 893 (1958); and *Magenau v. Aetna Freight Lines, Inc.,* 360 U. S. 273, 79 S. Ct. 1184 (1959). To permit a trial judge, in limine, to determine the disputed jurisdictional question adversely is to deny not only the constitutional right of trial by jury but also meaningful access to the federal courts. It presents a novel doctrine with far reaching consequences to all who seek to avail themselves of the constitutional right to litigate in the federal courts.

The question herein presented is substantial, new, and of public importance. The writ should issue and the judgment below be reversed.

Respectfully submitted,

B. Nathaniel Richter,
Richter, Lord & Levy,
Counsel for Petitioner.

Appendix.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLARY, *J.*

June 2, 1959

The Court has for consideration defendant's motion to dismiss for lack of diversity jurisdiction, 28 U. S. C. A. § 1332(a)(1) (1949).

Plaintiff, a citizen of Pennsylvania, was injured while driving an automobile which collided with a car driven by the defendant. In this action, based on diversity, plaintiff contends that the defendant was a citizen of the State of Delaware at the time suit was instituted. Both in her answer and by virtue of this motion, defendant has contraverted this assertion and has pleaded instead Pennsylvania citizenship. Upon order of the Court a hearing was held on this question at which both sides were given an apportunity of presenting evidence on the point. The oral testimony of the defendant taken at the hearing and her deposition taken previously constitute all the evidence adduced.

Heeding the admonition of Chief Judge Biggs in the case of *Underwood v. Maloney*, 256 F. 2d 334 (3d Cir. 1950), at page 340, that the issue of jurisdiction should be determined in limine by a trial court, the first question raised is whether the issue is one for determination by the court or by a jury. That it may be determined by the court without reference to a jury seems clear from the ruling in *Guarantee Trust Co. v. Collings*, 76 F. 2d 870 (3d Cir. 1935), *cert. denied* 295 U. S. 747 (1935); see also *Gilbert v. David*, 235 U. S. 561, 568 (1915). Indeed, it is appropriate that the court alone should pass on a question of this nature.

There must be recognition of the principle that jurisdiction in diversity cases is to be strictly construed; see *Thomson v. Gaskill*, 315 U. S. 442, 446 (1942). Citizenship for jurisdictional purposes, is equivalent to "domicile"; see *Brown v. Keene*, 8 Pet. 112 (U. S. 1834); *Brown v. Fennell*, 155 F. Supp. 424, 425 (E. D. Pa. 1957); *Hart & Wechsler, The Federal Courts and The Federal System 898* (1953). The determination of the question "domicile", certainly not a term of precise meaning, usually arises in divorce litigation and cases of devolution of certain types of property. An examination of precedent indicates that the determination of this question has usually been vested in the court rather than a jury. Should the court lack jurisdiction a trial would be a nullity. Hence, the necessity of a preliminary determination before proceeding with a long and costly trial. See *Underwood v. Maloney, supra.*

It has been suggested that the recent case of *Beacon Theatres, Inc. v. Westover*, 27 U. S. Law Week 4340 (May 26, 1959) — U. S. —, might indicate a different result. An examination of that case, however, shows that the question involved was one of right of trial by jury and not jurisdiction. There, jurisdiction was admitted; here, it is challenged. The Court will, therefore, proceed to a determination of the issue on the record presented in this case.

The evidence as disclosed by the record shows the following: Defendant, born in Philadelphia, moved to Newark, Delaware, with her parents, in 1927. In 1941 she returned to attend the University of Pennsylvania. While at the University she spent weekends with her parents in Newark. After completing her studies in 1943, she obtained employment in and established residence in Pennsylvania. In October 1951 she married a Pennsylvania citizen and resided in Philadelphia until June 1952 when the couple moved into the husband's house in Jenkintown, Pennsylvania. After defendant's husband died in November 1954, she continued living at the Jenkintown address, and at some later time purchased the house from her hus-

band's estate. She testified that soon after his death real estate agents began harassing her to place the house for sale and to relieve this constant pressure she quoted an exorbitant price she was certain could not be obtained, but with no serious idea of selling. She last voted in Pennsylvania in 1955; after 1957 her name was expunged from the voting lists for failure to vote for two successive years, although she had attempted unsuccessfully to secure an absentee ballot in 1956 while vacationing abroad.

The accident giving rise to the present litigation occurred in October 1955. At the time, defendant possessed a Delaware driver's license which listed her address as that of her parents in Newark. She explained that it was a permanent license of the type authorized by Delaware Law, requiring neither renewal nor payment of an annual fee;[1] and that she procured it soon after they were made available. Delaware Law also provides that notice shall be given in the event of a change of address.[2] Failure to comply, while entailing certain penalties, does not result in revocation of the license. Defendant disclaimed any knowledge of this requirement.

The first time defendant was in the State of Delaware subsequent to her husband's death was around Christmas 1955. Between that date and March 1956 she spent approximately three (3) days there. In March 1956 she began extensive travel abroad, returning to the United States in August 1956. It was during this period, on April 24, 1956 that suit was filed. In September 1956 she again travelled abroad. Before leaving she gave the key to her house to a real estate broker named Connor. The purpose of the transaction, according to defendant, was to enable Connor to look after the house during her absence. Following her return to the United States in January 1957, she resumed

1. See Del. Code Ann. Ti. 21, § 2714 (Supp. 1958). Authority for the issuance of permanent licenses was first granted in 1945. See 45 Del. Laws, Ch. 282, 288 (1945).

2. Del. Code Ann. Ti. 21, § 320 (1953).

occupancy of the house. From then until April 3, 1958 she visited her parents in Newark once a month, the duration of each stay being about one and one-half days, as well as spending many weekends in New York and Washington. In March 1958 Connor notified her of an offer that had been made to purchase her home. Although defendant contended that there had been no serious prior negotiations with Connor concerning sale—aside from the rather general statement she made to a number of brokers mentioned above—she accepted the offer; and on April 3, 1958 vacated the house, eventually settling in Maryland.

Defendant admitted that throughout her marriage and thereafter she had an account in a Newark bank, and had received third-class mail at her parents' address. The account dated from the times he was eight (8) years old. Although it lay dormant during her marriage, she resumed deposits after her husband's demise. Defendant attributed the Delaware addressed mail to the failure of many people to be aware of her marriage. She strenuously insisted that at no time prior to March 1958, when the offer to purchase her home was made, did she entertain any intention of living other than in Pennsylvania. Until then, she planned to spend the rest of her life in Jenkintown.

Diversity is controlled by the status of the parties at the time suit is begun. See *Smith v. Sperling*, 354 U. S. 91, 93 n. 1 (1957); *Brown v. Fennell, supra.* In the instant case, defendant's marriage conferred upon her the citizenship of her husband. See *Price v. Greenway*, 167 F. 2d 196, 199 (3d Cir. 1948); *Seegers v. Strzempek*, 149 F. Supp. 35, 37 (E. D. Mich. 1957). Thus, at least until the death of her husband in November 1954, defendant was a citizen of Pennsylvania. Unless a change of domicile took place before the complaint was lodged dismissal must follow. Plaintiff has made no attempt to argue that defendant's domicile was other than Pennsylvania or Delaware. Indeed, were such a theory advanced it would meet immediate rejection in view of the total absence of evidence linking

defendant with any state but these. Our inquiry, therefore, is limited to the question whether she effected a change of domicile from Pennsylvania to Delaware.

Much of plaintiff's argument appears to be premised upon the idea that one may change his domicile by merely intending to do so. This is not the law. In the posture of this case, change would necessitate physical presence in the new domicile with the concurrent intent to live there for an indefinite period of time; or, stating the latter essential negatively, with the absence of any intent to live elsewhere. See *Williamsson v. Osenton*, 232 U. S. 619 (1914); *Gallagher v. Philadelphia Transp. Co.*, 185 F. 2d 543, 546 (3d Cir. 1950); *Goodrich Conflict of Laws*, P. 60-61 (3d Ed. 1949). The domiciliary formula, therefore, contains both tangible and intangible components. Here, defendant was admittedly present in Delaware for three (3) days during the relevant period. Assuming that this was of sufficient duration to supply the tangible ingredient, the elusive element of intent becomes crucial. The intent sought to be discovered is that existing at the time defendant was physically present in Delaware.

The factors that might be thought to prompt a finding favorable to the plaintiff are few and unconvincing. When analyzed and balanced against the remaining evidence, the conclusion is inescapable that plaintiff was domiciled in Pennsylvania at the time suit was instituted. The Delaware driver's license is a tenuous foundation for inference in view of the fact that retention entailed no action on the part of defendant. Similarly, whatever the import of her failure to notify the Delaware authorities of a change of address might otherwise be, the Court considers it nugatory in light of her lack of knowledge of the statutory provision. The fact that mail continued to be addressed to defendant at her former Delaware residence is not a very unusual feature, particularly since she had been married a comparatively short time. That it resulted from a mistake concerning defendant's marital status is attested to by the

fact that most of her mail was received in Jenkintown. The resumption of deposits in the Newark bank, standing alone, may be suggestive of a renewed attachment to the area. Conversely, during the identical period defendant had an active account in Jenkintown upon which she drew for the payment of her expenses. The statement made by defendant to several brokers that she would sell her house if a given price was obtained, and the gesture of entrusting Connor with the key while she was abroad, are somewhat equivocal indicia. As explained by defendant, they are virtually of no significance; with the gloss placed upon them by plaintiff they at best suggest that defendant may have had a nebulous notion of moving at some future date. The latter, however, does not suffice; for one must actually sever contact with the old domicile and adopt the new.

More weighty data support the defendant's contention. Until April 3, 1958 her living quarters were in her Jenkintown house. While she was so-journing in foreign lands a maid regularly saw to the upkeep of the house, and the utilities were never turned off. Moreover, not only did defendant vote in Pennsylvania in 1955, but she attempted to procure an absentee ballot for the November 1956 Presidential election thereby indicating that she still considered herself a Pennsylvanian. The short duration of her stays in Delaware is more suggestive of a visit than a permanent connection. Finally, there is the flat assertion of defendant —credited by the Court—that she had no intention of leaving Pennsylvania.

Since the Court finds, upon an examination of the entire record, that defendant was a citizen of Pennsylvania when the action was initiated, dismissal is mandatory. An appropriate order, therefore, will be entered.

ORDER.

AND NOW, to wit, this 2nd day of June, 1959, for the reasons set forth in the Opinion filed concurrently herewith, it is:

ORDERED, ADJUDGED AND DECREED

that defendant's motion to dismiss for want of jurisdiction be and it is hereby granted and the motion is dismissed.

By THE COURT,

THOMAS J. CLARY,

J.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed February 17, 1960)

By STALEY, *Circuit Judge*.

We are asked to determine whether the district court erred in refusing to submit the controverted question of diversity to a jury for determination, and, secondly, if this refusal was correct, did the court err in its conclusion that there was a lack of diversity.

The action arose as a result of injuries sustained by appellant, a citizen of Pennsylvania, in an automobile collision with a car driven by appellee. Jurisdiction was based upon diversity, appellant contending that appellee was a citizen of Delaware at the time the suit was instituted. Appellee denied this assertion by her answer and by a motion to dismiss for lack of diversity jurisdiction, 28 U.S.C. § 1332(a)(1), alleging Pennsylvania citizenship. The district court ordered a hearing at which both parties were given an opportunity to present evidence. Upon the oral testimony produced at the hearing and the deposition of appellee, the district court found that appellee was a citizen of Pennsylvania when the action was initiated and thereupon dismissed the action.

The evidence as disclosed by the record indicates the following: Appellee was born in Philadelphia but moved with her parents to Newark, Delaware, in 1927. She lived in Delaware until 1941, when she matriculated at the University of Pennsylvania. Thenceforth she merely spent week ends with her parents in Newark. Upon completion of her academic studies, appellee accepted employment and established a residence in Pennsylvania. Eight years later she married a citizen of Pennsylvania, and they established a home in Philadelphia. In June of 1952 the couple moved to a home in Jenkintown, Pennsylvania, and she remained there following her husband's death in November, 1954. At some later date appellee purchased the home from her

husband's estate. She testified that soon after her husband's death, real estate agents began harassing her to place the house up for sale and to avoid this constant annoyance but with no fixed idea of selling, she quoted an exorbitant price which she was certain could not be obtained. Appellee last voted in Pennsylvania in 1955 and attempted unsuccessfully to secure an absentee ballot in 1956 while vacationing abroad. Her name was removed from the voting lists in 1957 for failure to vote for two successive years.

Following her husband's death, appellee visited her parents in Newark, Delaware, around Christmas, 1955. Between that visit and March, 1956, she spent only three days there. Thereafter appellee traveled abroad until August, 1956.[1] In September of the same year she again traveled abroad. During the entire period of these sojourns, appellee maintained the residence in Jenkintown, employing a maid to supervise it. Prior to embarking on the second foreign trip, appellee left a key to the house with a real estate broker named Connor. Her purpose in doing so, she testified, was to enable Connor to look after the house in her absence. Subsequent to her return to the United States in January, 1957, appellee resumed occupancy of her home and sporadically visited her parents in Delaware, never staying more than one or two days. Although the property had never been listed with Connor for sale, in March, 1958, he approached her with an offer for the house which she accepted. She maintained that there had been no prior negotiations with Connor or any other broker other than the fixing of the price which, as has been noted, she considered to be exorbitant. On April 3, 1958, she surrendered possession of the Jenkintown house and moved to Maryland.

The accident upon which the instant action is founded occurred in October, 1955. At that time appellee possessed

1. It was during this period, on April 24, 1956, that suit in the instant case was filed.

a Delaware driver's license upon which was listed the Delaware address of her parents. She testified that she obtained this permanent license soon after they were first authorized,[2] and it required neither renewal nor payment of an annual license fee. Although Delaware law provides that notice of change of address is required,[3] appellee denied knowledge of this requirement. In addition, appellee throughout her marriage and thereafter maintained an account in a Newark bank and received mail at the home of her parents. The bank account dated from the time she was eight years old, and although it lay dormant during her marriage, she resumed deposits after her husband's death. Appellee attributed the mail addressed to the Delaware address to the failure of many people to be aware of her marriage. Most importantly, appellee insisted that prior to March, 1958, she had no intention of living anywhere other than in Pennsylvania and planned to spend the rest of her life in Jenkintown.

Appellant seems not now to contend, as he evidently did in the district court, that there is an absolute right to trial by jury on all issues of fact involved in diversity where it is the basis of jurisdiction. He does maintain, however, that the determining factor in the case was the assessment of appellee's testimony concerning her domiciliary intentions following the death of her husband, and, since such appraisals have traditionally been left to the jury, it was error for the district court to fail to do so.

Although appellant has cast his argument in different terms, on analysis it appears that his position has not really changed. The resolution of controverted factual issues evidenced by the testimony of witnesses always requires the appraisal of the witnesses' credibility, and thus would require the use of a jury in every such case. This is not the law, but rather it has been recognized that the trial court has a choice of modes for determination of the

2. Permanent licenses were first authorized by the State of Delaware in 1945. See 21 Del. Code Ann. § 2714.

3. 21 Del. Code Ann. § 320.

issues and may either decide them itself or refer them to a jury for resolution. The same issue was raised in Gilbert v. David, 235 U.S. 561, 568 (1915), where diversity was also questioned:

> "It is also insisted that the court erred in itself considering the *testimony* and in not submitting the issue to the jury. But while the court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. Wetmore v. Rymer, 169 U.S. 115." (Emphasis supplied.)

The district court herein exercised that privilege, and its refusal to submit the issue of diversity to a jury cannot be challenged on appeal as an abuse of discretion. Guarantee Trust Co. v. Collings, 76 F.2d 870 (C.A. 3), cert. denied, 295 U.S. 747 (1935). See 5 Moore's Federal Practice ¶ 38.36 (2d ed.), and cases cited therein.

Appellant's second contention is equally without merit. On the basis of the undisputed testimony and the reasonable inferences that could be drawn therefrom, the district court concluded that the appellee was a citizen of Pennsylvania when the action was initiated and so dismissed the case. The most that can be said about the appellant's analysis of the evidence is that a court, if it disbelieved the appellee, might have come to a contrary result on the issue of intention and thus have found the appellee to have been a citizen of Delaware. That this conclusion was not compelled, however, is quite obvious from a review of the facts recited above. The trial court had an opportunity to hear the appellee testify and credited her testimony. It is not the province of an appellate court to reverse a trial court under such circumstances unless it is convinced that clear error has been committed. This is not such a case.

The judgment will be affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

February 17, 1960

FILE COPY

FILED
JUN 1 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 903.

WALTER SEIDMAN,
Petitioner,

v.

ANNE HAMILTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RULE CITED

Federal Rule of Civil Procedure 12h, 28 U. S. C. A. 5

AUTHORITY CITED

Restatement of the Law of Conflicts of Laws, Sec. 29 .. 6
Sec. 15 6

COUNTER STATEMENT OF QUESTION INVOLVED.

1. May the United States District Court, upon consideration of the defendant's deposition and oral testimony in open court relating to the issue of diversity jurisdiction, dismiss the action because of lack of diversity jurisdiction without submitting the issue of diversity jurisdiction to the jury?

COUNTER HISTORY OF THE CASE.

This action for personal injuries arises out of an automobile accident which occurred on October 28, 1955 in suburban Philadelphia, Pennsylvania. At the time of the collision the investigating police officers ascribed to the defendant the address Box 265, 120 Wells Avenue, Newark, Delaware. This address was obtained from an old driver's license of the State of Delaware.

The plaintiff in his Complaint identified the defendant as being a resident of the State of Delaware.

There is no showing of any attempt to obtain any other address for the defendant, although there was ample time for investigation between the date of accident, October 28, 1955, and the filing of the plaintiff's Complaint, April 24, 1956. Any reasonable investigation attempts by the plaintiff would have clearly disclosed that the defendant was at time of accident and at the time the Complaint was filed a citizen of the State of Pennsylvania. There clearly is no evidence of or any allegation that the defendant in any way sought to conceal or misrepresent in any manner her citizenship at any times pertinent to the matter at hand.

The plaintiff filed his Complaint in the United States District Court for the Eastern District of Pennsylvania on April 24, 1956. Service was made by the United States Marshal upon Secretary of the Commonwealth of Pennsylvania as is the procedure provided for in cases involving foreign residents. The defendant filed her Answer on December 28, 1956 to the Complaint denying the existence of diversity of citizenship of the parties, and averred clearly that the defendant was a resident of the State of Pennsylvania. The first inquiry concerning the defendant's citizenship was made by the plaintiff at a deposition of the defendant taken on December 30, 1958, some two years after the defendant filed her Answer denying that she was a resident of Delaware. On December 10, 1958 a pre-trial

conference was held at which time the defendant again asserted the defense of lack of diversity and consequent jurisdiction. Subsequently, the defendant filed a Motion to Dismiss for want of jurisdiction. It is the ruling of Judge Clary of United States District Court, Eastern District of Pennsylvania, in favor of the defendant on the jurisdictional question that gives rise to the plaintiff's appeal.

The facts touching upon the question of the defendant's citizenship were developed by way of deposition of the defendant and upon Court hearing before Judge Clary, May 6, 1959, at which the defendant testified on the question of citizenship and was examined thereon by the Court and counsel for the plaintiff.

That testimony developed the following: defendant was born in Philadelphia, Pennsylvania, moved to Newark, Delaware, with her parents, in 1927. She returned to Philadelphia where she attended the University of Pennsylvania, 1941-1943. Upon completion of her studies at the University she found employment and lived in Philadelphia, Pennsylvania. In October of 1951 she married a Pennsylvania citizen and resided in Philadelphia with him until June of 1952 when the couple moved to Jenkintown, Pennsylvania where they lived in a house belonging to the husband. The defendant's husband died in November, 1954, and she continued living at the Jenkintown address, and sometime later purchased the house from her husband's estate. Following the death of her husband, certain real estate agents called the defendant widow concerning the possibility of her desiring to sell her home. She testified that she became harassed by the pressures of these real estate men and quoted an exorbitant price which she felt certain that she could not obtain, but had no serious idea of selling (41a). She voted in Pennsylvania up until 1955; after 1957, because of her failing to vote for two successive years, her name was removed from the voting lists, although she had attempted unsuccessfully to secure an absentee ballot while travelling abroad in 1956.

The defendant remained in and about the Philadelphia area following the death of her husband until around Christmas of 1955 when, for the first time subsequent to her husband's death, she went to the State of Delaware for approximately three days to visit with her folks. In March of 1956 she commenced extensive travel abroad remaining out of the United States until August of 1956. In September of 1956 she again travelled abroad, returning to the United States in January of 1957. In September of 1956 before leaving, she gave the key to her house to a real estate broker friend named Connor. The purpose of her giving the key to Connor, according to the defendant, was to enable Connor to look after the house during her absence (34a-36a). From the time she moved into her home with her husband in 1952, until April 3, 1958 at which time she sold her home, she had in her employ a maid named Mamie Matthews who had a room in her house, and took care of all the household duties, even during the periods when the defendant travelled abroad (13a-14a).

In March of 1958 Connor advised the defendant that he had an interested purchaser for her home. Defendant testified that there had been no serious prior negotiations with Connor concerning any sale other than her general facetious remarks she made to a number of brokers shortly following her husband's death. On May 3, 1958 the defendant sold her Jenkintown home and eventually settled in Maryland where she presently resides.

The defendant strenuously insisted that at no time prior to March, 1958 when Connor advised her of an offer to purchase her home, did she entertain any intention of living or residing at any place other than Pennsylvania. Until that date she planned to live the rest of her life in Jenkintown, Pennsylvania (37a), (23a). At the age of eight (8) years while living with her parents in Delaware, a bank account was opened for the defendant which laid dormant and inactive during the years of her marriage, which bank account the defendant presently maintains.

In light of the testimony disclosed by the depositions and the defendant's oral testimony to the Court, the lower Court entered its Order dated June 2, 1959 dismissing the plaintiff's suit for want of jurisdiction.

The plaintiff appealed the District Court's Order dismissing the action to the Third Circuit Court of Appeals. The matter was heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel and upon consideration it was ordered and adjudged by the Third Circuit Court of Appeals that the District Court's Order be affirmed.

ARGUMENT.

The evidence before the Court was sufficient to enable the Court to rule that the defendant was at all times pertinent to the jurisdictional question a resident of Pennsylvania. The Court properly did so without having to submit the jurisdictional question to a jury.

The question of jurisdiction is vital in all cases, and that question must and should be resolved by the Trial Court in order to preclude the likelihood of long or costly trials. Federal Rule of Civil Procedure 12h, 28 U. S. C. A. provides that upon suggestion of the parties or otherwise, the Court shall dismiss the action when jurisdiction is lacking. *McLarty v. Borough of Ramsey*, U. S. D. C. of N. J., 1958, 166 F. Supp. 291, 296.

In the case of *Underwood v. Maloney*, 256 F. 2nd 334, 340 (3rd Cir. C. 1958), Chief Justice Biggs stated, "It must be borne in mind that the issue of jurisdiction has always been and should be determined in limine by a trial Court, *Mitchell vs. Maurer*, 1934, 293 U. S. 237, 55 Sup. Ct. 162, 79 L. Ed. 338; *Mansfield C. & L. M. Ry. Co. vs. Swan*, 1884, 111 U. S. 379, 4 S. Ct. 510." The trial Court may determine

jurisdictional questions without reference to a jury. *Guarantee Trust Co. v. Collins*, 76 Fed. 2nd 870 (3rd Cir. C. 1935). The question of jurisdiction in diversity cases is to be strictly construed. *Thompson v. Gaskill*, 315 U. S. 442, 446 (1942).

There is no question under the facts of this case that the defendant was clearly a citizen of the State of Pennsylvania as of the time of her marriage in October, 1951, and that such status continued without question until the time of her husband's death in 1954. Domicile being then established in Pennsylvania is presumed to continue until it is shown to have been changed. *Berger v. City of Phila.*, 8 F. R. D. 39. Restatement of Law, Conflict of Laws, Sec. 29. To bring about a change of citizenship from one state to another, there must be residence in the new domicile and intention to remain there permanently or indefinitely, and both physical presence and animus manendi in the new location must concur. *Zellem v. Herring*, 97 F. Supp. 103 U. S. D. C., W. D. of Pa. (1951); *Paulder v. Paulder*, 185 Fed. 2nd 901. To constitute a change in domicile two things are indispensable: first residence in the new locality; and second the intention to remain there. The change cannot be made facto et animo. Both are necessary. Either without the other is insufficient. *Jennings v. Fanti*, 96 Fed. Supp. 264; *Mitchell v. U. S.*, 21 Wall. 350, 88 U. S. 350; *Restatement of Law, Conflict of Laws*, Sec. 15.

The evidence disclosed in this case it is submitted, clearly shows that the defendant remained a resident of the State of Pennsylvania until April 3, 1958, the date which she sold her home in Jenkintown and moved to her present location in Maryland. It was not until March of 1958 that she formed any intention of leaving Pennsylvania to take up residence elsewhere. The fact that she travelled abroad extensively following her husband's death, cannot be taken as an intention to give up her Pennsylvania citizenship. As a matter of fact she returned from these travels and again occupied her Jenkintown, Pennsylvania home continuously until she sold it in April of 1958.

The only evidence connecting the defendant with Delaware citizenship is the fact that she had in her possession at the time of accident her old Delaware driver's license from which the police obtained her old Delaware address. It is submitted that this modicum of evidence is completely over-shadowed and clearly controverted by the facts of her marriage to a Pennsylvania resident and continued residence in Pennsylvania until April of 1958.

In the case of *Brown v. Fennell*, U. S. D. C., E. D. of Pa., 155 Fed. Supp. 424, on facts not dissimilar, it was held that mere possession of a driver's license of the State of New Jersey by a Pennsylvania citizen was not evidence of citizenship or domicile in New Jersey sufficient to support diversity of jurisdiction. There, at time of accident the defendant was driving a car registered in New Jersey, and the address of his New Jersey operator's license was his school residence in New Jersey. At the time the Complaint was filed in that matter the defendant had returned to his family home in Pennsylvania. The Complaint alleged that the plaintiff was a citizen of Pennsylvania, and that the defendant was a citizen of New Jersey. Diversity of citizenship being the sole ground for jurisdiction. The defendant then moved for dismissal of the action on the grounds that the requisite diversity of citizenship was lacking inasmuch as both parties were domiciliaries of Pennsylvania. The Court in dismissing the case for want of jurisdiction stated, "While the New Jersey registration could have misled the plaintiff, it is clearly of little value to support the plaintiff's contention that the defendant was a New Jersey citizen."

The question of diversity is controlled by the status of citizenship of the parties at the time the suit is begun. *Smith vs. Sperling*, 354 U. S. 91, 93 n. 1 (1957); *Brown vs. Fennell*, Supra.

The Petitioner in this matter states that the Trial Court and the Court of Appeals recognized that the evidence was not so clear and unambiguous as to justify taking the ques-

tion of jurisdiction from the jury. A careful reading of both the District Court and Third Circuit Court of Appeals Opinions will show that both Courts are in complete agreement that the evidence in this case justified no other action than removal of the jurisdictional question from jury presentation.

The case of *Gilbert v. David*, 235 U. S. 561, 35 S. Ct. 164. this Court held that the issue of citizenship of the plaintiff in a suit brought in a Federal Court need not be submitted to the jury but may be disposed of by the Court upon the testimony introduced by the parties upon that question. It was also insisted in that case that the Court erred in itself considering the testimony and in not submitting the issue to the jury. The Court stated "but while the Court may have submitted the question to the jury it was not bound to do so, the parties having adduced their testimony pro and con, it was the privilege of the Court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon the subject." In this present case the Trial Court fully heard the pro and con arguments and weighed all of the evidence available on the subject and decided that the jurisdictional requirement had not been satisfied.

It is submitted that had this question been presented at trial the evidence would have adduced the same facts as were presented to the District Court by way of deposition and open hearing in Court of the defendant. Upon such the District Court would have been able to declare as a matter of law that jurisdiction was not satisfied. All that was done here by the District Court was to prevent a needless expenditure of the Court's time in having this case go on trial before jury and reach the only conclusion possible under the facts of this case.

CONCLUSIONS.

The uncontroverted facts here admit of no interpretation other than that at all times pertinent to the jurisdiction question the defendant and the plaintiff were both citizens of Pennsylvania, and that diversity jurisdiction was, therefore, lacking. Accordingly the United States District Court was proper in dismissing the action for want of jurisdiction. For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

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